IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Number_____

JAMES VAN GILDER,
Petitioner,
vs.
AMERICAN SURETY COMPANY,
OF NEW YORK, a New York Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH DISTRICT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, JAMES VAN GILDER, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth District, to review a decision rendered November 6th, 1940 reversing a judgment of the United States District Court for the Eastern District of Michigan, Southern Division; American Surety Company of New York v. Van Gilder, 115 Fed. (2d) 200.

SUMMARY STATEMENT OF THE MATTER INVOLVED

(Figures in parentheses refer to pages of the printed record unless context clearly denotes otherwise)

Two main questions are presented by the decision of the Circuit Court of Appeals:

1. The primary question presented by the decision

of the Circuit Court of Appeals is whether the Federal courts are bound to recognize a statute of the state of Michigan and the interpretation placed thereon by the Michigan Supreme Court, that the going without the jail limits of a judgment debtor shall be deemed an escape of such prisoner, imposing liability upon the sheriff therefor?

2. Is not a sheriff who by statute is held guilty of an escape, necessarily guilty of nonfeasance in office imposing liability upon the surety on his official bond?

These questions arise from a series of litigation the facts concerning which are not in dispute (60).

Petitioner recovered judgment in an action of trespass on the case against one Howard Sturgis in the Circuit Court for the County of Ingham (14). Based upon such judgment a writ of capias ad satisfaciendum was issued to John S. Barnes, sheriff of the county of Clinton, state of Michigan, and was duly served by his deputy by the taking of Howard Sturgis into his custody (16, 17). Thereafter a jail limits bond was executed in favor of the sheriff and said Howard Sturgis was permitted the liberties of the jail limits (37, 38). On December 16, 1937 said Howard S. Sturgis went without the jail limits of the county of Clinton without the assent of petitioner, the judgment creditor, and suit was instituted against John S. Barnes who is still sheriff of Clinton county, based upon such escape (21, 23). Following appeal, such suit resulted in judgment in favor of petitioner against such sheriff (29). Later, the instant suit was instituted against respondent, surety upon the official bond of said sheriff to recover the amount of such judgment (1, 5). Following the removal of the suit to the United States District Court for the Eastern District of Michigan, Southern Division by reason of diversity of citizenship, issue was joined and both parties filed motions for summary judgment (11, 39). There was filed in support of plaintiff's motion, affidavits of witnesses to the issues involved (30, 33) as well as certified copies of the original judgment against said Howard Sturgis (15) the writ of capias

ad satisfaciendum with the sheriff's return thereon (16, 17) and certified copies of the pleadings and judgment in the suit against the sheriff (23-30).

The district court held that inasmuch as under the law of Michigan the sheriff is liable for such escape, and inasmuch as such liability is predicated upon the failure of the sheriff to faithfully perform and execute his office, and inasmuch as such holding by the state court was binding upon the federal court, therefore it must be held that the condition of the sheriff's official bond had been breached (62, 63) and he accordingly granted petitioner's motion and entered judgment in his behalf (69).

GROUNDS FOR GRANTING THE WRIT

The Writ of Certiorari is accordingly sought on the grounds:

1. The decision of the Circuit Court of Appeals that the escape of a judgment debtor did not result in a breach of the official bond of the sheriff imposing liability upon the surety upon his official bond, was in conflict with applicable decisions of the Supreme Court of the State of Michigan.

2. The Federal Court is bound by the interpretation given the Michigan statute by decisions of the Michigan Supreme Court and the holding of the Michigan courts to the effect that such liability upon the part of the sheriff is predicated on breach of his official duty.

3. The Circuit Court of Appeals in its opinion ignored the basis of the sheriff's liability under the Michigan statute which is breach of official duty in permitting the escape.

4. The opinion of the Circuit Court of Appeals is in conflict with decisions of the Michigan Supreme Court which hold that Michigan by enacting this statute has adopted the common law action of escape, violation of which necessarily involved breach of official duty and constitutes nonfeasance in office.

5. Although respondent, by executing as surety, the official bond of the sheriff undertook thereby to indemnify any person unlawfully injured by its principal's nonfeasance in office, nevertheless the effect of the decision of the Circuit Court of Appeals is to relieve such surety from liability for a judgment against its principal although that judgment is predicated upon the nonfeasance of the sheriff in the performance of his official duties.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the sixth circuit, commanding said court to certify and transmit to this honorable court a full and complete transcript of the record of said cause, numbered and titled on its docket as "American Surety Company of New York, a New York corporation, Appellant, v. James Van Gilder, Appellee, Number 8579" and that the judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner be granted such other and further relief as he may be entitled to under the facts and law.

Respectfully sumbitted,

PLUMMER SNYDER,
JOSEPH W. PLANCK,
Attorneys for Petitioner.
RUSSELL A. SEARL of Marshall
Searl & Dean,
Of Counsel.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Number.....

JAMES VAN GILDER,
Petitioner,

vs.

AMERICAN SURETY COMPANY,
OF NEW YORK, a New York Corporation,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS

The opinion of the Circuit Court of Appeals is reported in 115 Fed. (2d) 200 and also on page 72 of the record.

The findings of fact and conclusions of law of the Federal District Court are given in full at page 60 of the record.

JURISDICTION

The jurisdiction of this honorable court is invoked under Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. Sec. 347).

The judgment of the Circuit Court of Appeals was entered on November 6, 1940 (71).

ARGUMENT

The facts have been pleaded in the foregoing petition for the writ and are not here repeated.

1. Under the law of Michigan, does a breach of the official bond of a sheriff result from the escape of a judgment debtor arrested by such sheriff under capias ad satisfaciendum and at liberty under jail limits bond, and is the surety upon such official bond liable for the judgment recovered against the sheriff based upon such escape?

While there is no case in the Supreme Court of Michigan or any other court directly in point with this case, and therefore strictly speaking it is a case of first impression, nevertheless as is here demonstrated all of the pertinent authorities both in Michigan and elsewhere are in support of plaintiff's contention that the permitting of an escape by a judgment debtor results in a breach of the sheriff's official bond.

The general Michigan rule as to the liability of the sureties was not in dispute, i. e., that the surety upon the official bond of the sheriff is liable "to all persons unlawfully injured by nonfeasance, malfeasance or misfeasance perpetrated by the sheriff, virtute officii or colore officii".

Kosowsky v. Fidelity & Deposit Co., 245 Mich. 266. 222 N. W. 153.

The opinion of the Circuit Court of Appeals recognized that rule but held that inasmuch as the statute provided for the allowing of the debtor the freedom of the jail limits that he had not been guilty of any act which would result in a breach of the bond. It is submitted that in reaching that conclusion the court overlooked the basis for holding the sheriff liable under the Michigan law, and that its construction therefor is contrary to the law of Michigan, for the following reasons:

1. It is the established law of the state of Michigan that it is the duty of the sheriff after taking a judgment debtor into his custody under a writ of capias ad satisfaciendum, to restrain him until discharged according to law. Such is the mandate of the writ and statute.

2. While the statute does permit the judgment debtor

the liberties of the jail limits upon filing proper bond, nevertheless the sureties upon such bond must be satisfactory to the sheriff for whose benefit the bond is given.

Sec. 14733-36 *C. L. of Mich.*, 1929.

3. If, after the judgment debtor has been released to the jail limits, the sheriff becomes dissatisfied with the sureties, he may retake the judgment debtor and confine him in close custody until satisfactory bond is given.

Kruse v. Kingsbury, 102 Mich., 100
60 N. W., 443.

4. While the judgment creditor has the option upon the escape of the judgment debtor, of taking assignment of such bond, and the bond is therefore given for his protection as well as the sheriff, nevertheless the approval of the sureties upon the bond is left entirely to the sheriff, the Michigan law making no provision for notice thereof to the creditors nor right by him to object thereto.

5. The going without the jail limits of the judgment debtor without the assent of the creditor "shall be deemed an escape of such prisoner and the sheriff having charge of such jail shall be answerable therefor."

Sec. 14752 *C. L. of Mich.*, 1929.

6. Under the statute the Michigan court has held that the sheriff is liable to the judgment debtor for the escape even though the judgment debtor at the time thereof was at liberty under a jail limits bond.

Wilson and Co. v. Franz, 206 Mich. 581,
173 N. W. 541.

The Supreme Court in that case reaffirmed the rule which has always existed in the state of Michigan to the effect that upon the escape of a judgment debtor the creditor has the option of either taking an assignment of the jail limits bond and suing thereon or pro-

ceeding against the sheriff based upon such escape as was done in the case at bar.

7. By the enactment of such statute the state of Michigan adopted the common law rule, "In respect to escape of a prisoner confined to jail limits and the consequences of such escape."

Optner v. Bolger (6c.) 95 Fed. (2d) 241.

8. Such common law action of escape was predicated upon either the willful or negligent act of the sheriff. In either event is violation of his official duty.

9. Inasmuch as under the law of Michigan the sheriff was liable for such escape and inasmuch as such liability was predicated upon the failure of the sheriff to faithfully perform and execute his office, and inasmuch as such holding by the state court is binding upon the federal court, it follows that the federal court should have held that the condition of the sheriff's official bond had been preached.

Such was the holding of the district court (60). However the Circuit Court of Appeals apparently upheld respondent's contention to the effect that in order to impose liability upon his bondsman the sheriff must have been guilty of an overt act of nonfeasance. But, as above demonstrated, to so hold is to entirely disregard the basis of the liability of the sheriff under the Michigan statute.

The Circuit Court of Appeals is likewise in error in stating in its opinion that it was not contended that the sureties upon the jail limits bond were inadequate. As we pointed out to that court, if such were not the case, then this appeal would never have reached that court, and their liability would have long since been enforced under the suit instituted by the sheriff in July, 1939 (36).

However, in the action brought against the sheriff, liability was not predicated upon that ground but rather upon the escape of the judgment debtor for which under the Michigan law he is responsible.

Again the court is in error in its holding as to the discretion lodged in the sheriff under the Michigan law as to the approval of the sureties on the jail limits bond. As pointed out in our brief, such sureties must be satisfactory to the sheriff and he must continue to be satisfied with their financial condition. Otherwise he is entitled to retake the judgment debtor and confine him to close custody until bond with satisfactory sureties is posted. Such discretion is lodged in him under the Michigan law in keeping with the absolute liability imposed upon the sheriff for an escape of a judgment debtor in order that the sheriff may indemnify himself against such possibility.

Again the court is in error in its opinion stating that section 14752 of C. L. of 1929 is not to be read into the official bond of the sheriff, for it is the law of the state of Michigan the "sureties must be supposed to have had in view when they signed the bond, all duties which existing statutes imposed upon their principal."

Marquette County v. Ward, 50 Mich. 174, 177.

The Michigan court has never held as indicated by the opinion of the Circuit Court of Appeals that a judgment debtor within the jail limits is not in the custody of the sheriff. In various decisions cited in the opinion of the Court of Appeals there appear statements to the effect that the judgment debtor while at liberty under a jail limits bond is in the custody of the surety thereon. However, such statements were always made in discussing the liability of the surety upon the jail limits bond — not that of the sheriff, and the holding of those cases was that the liability of such sureties upon the jail limits bond was coterminus with that of the sheriff. All of those cases recognized the rule as is pointed out in the opinion of the Circuit Court of Appeals, that nothing but the act of God or enemies of the country will excuse the sheriff for an escape. That was the common law rule which was adopted by the state of Michigan. But the effect of the opinion of the Circuit Court of Appeals, unreversed, would be that while such

rule has been adopted so as to impose liability upon the sheriff, nevertheless the necessary result of such liability, breach of his official bond, did not follow. Such holding is not only illogical but opposed to all of the authority from all jurisdictions upon this direct question.

18 *Am. Jur.* page 372 et sequi, *Escape, Prison breaking and Rescue,* Sec. 31 et sequi.

"The escape of a prisoner from the custody of a sheriff or constable works a breach of a condition of the officer's official bond that he shall faithfully perform the duties of his office."

57 *C. M. Sheriffs and Constables,* Sec. 956.

"Where the sheriff suffers a prisoner to escape, this is a breach of his official bond."

Murfree on Sheriffs, Sec. 47a of Ch. 2a, citing *Lakin v. State ex rel.,* 89 Ind. 68.

"The officer and his sureties are liable for defaults arising out of the performance of his ministerial duties, which include those acts which the law authorizes him to perform, and which are considered to come within the scope of his office. The officer is not civilly liable for judicial acts. But he and sureties are liable for * * * an escape of prisoner,"

Citing *People v. Dikeman,* 3 Abb. App. Dec. (N. Y.) 520;
Pingrey on Suretyship and Guaranty, Sec. 325;

See also:

Murfree on Official Bonds, Sec. 693;
Sedgwick on Damages, Sec. 692i;
Arnold, Suretyship and Guaranty, Sec. 248;
Spencer on Suretyship, Sec. 264.

For a general statement of the liability of surety on

the sheriff's official bond see *South v. State of Maryland;* 18 Howard 396, 402, 15 L. Ed. 433, 435.

The Michigan court has held the surety upon the official bond of the sheriff liable for the escape of a prisoner arrested upon a capias ad respondendum. *McCallum v. Gebhardt,* 154 Mich. 504, 118 N. W. 16.

There is no distinction in principle between an escape of a prisoner arrested under a writ of capias ad respondendum and one arrested under a capias ad satisfaciendum. In either case, it is the duty of the sheriff to restrain such prisoner in accordance with the mandate of the writ and the statutes of the state, and his failure to do so necessarily constitutes neglect of official duty. The distinction between the remedy of the creditors under the two writs is solely one of procedure. That the legislature considered the permitting of an escape to constitute neglect of duty by the sheriff and breach of his official bond is evidence by the wording of the section relative to writs of capias ad respondendum (Sec. 14720 *C. L. of Michigan,* 1929) which provides:

> "If such execution be returned unsatisfied, in part or in whole, the same proceedings shall be had upon the official bond of such sheriff or other officer to collect such deficiency, *as in other cases of delinquency.*"

2. The Federal Court is bound by the interpretation given the Michigan statute by decisions of the Michigan Supreme Court and the holding of the Michigan courts to the effect that such liability upon the part of the sheriff is predicated on breach of his official duty.

A question of the law of Michigan being involved, the federal courts are bound not only by the Michigan statutes but by the interpretation given thereto by the state court. A late case enunciating that doctrine is *West v. American Telephone and Telegraph Company* (decided December 9, 1940 in the United States Supreme Court). As appears from the argument under the preceding heading, the basis for the liability of the sheriff for such escape is the failure of the sheriff to faithfully perform

and execute his office. The Supreme Court reaffirmed that rule in *Wilson and Co. v. Franz*, 206 Mich., 581, 173 N. W. 541. In the district court, petitioner relied upon the authority of that case. However the district court in its conclusions of law relied upon the fact that in the case brought against the sheriff and resulting in the judgment which forms the basis of the action at bar, the state court had imposed liability on the sheriff and predicated such liability upon breach of the official duty of the sheriff in permitting such escape. The district court held that the federal court was bound by such determination of the state court. In so holding we submit that he was absolutely correct.

3. The Circuit Court of Appeals in its opinion ignored the basis of the sheriff's liability under the Michigan statute which is breach of official duty in permitting the escape.

The opinion of the Circuit Court of Appeals entirely overlooks the basis of the judgment against the sheriff, i. e. breach of official duty in permitting the escape. As set out at length in the argument under the first heading such absolute liability is imposed upon the sheriff. By virtue of the statute he is deemed guilty of an escape. Both the state and federal court are in accord that Michigan, by enactment of such statute adopted the common law rule of escape. At the common law there were two types of escape, willful and negligent. It is not the claim in the case at bar that there was any willful act on the part of the sheriff, but it does follow that by virtue of the statute imposing liability upon him for a negligent act, that a breach of his official bond follows for the same constitutes nonfeasance in office, that is, the failure to perform an act which is required by the statute as part of his official duties.

Under the admitted rule the surety is liable for the result of such nonfeasance.

Kosowsky v. Fidelity and Deposit Co., 245 Mich., 266, 222 N. W. 153.

4. The opinion of the Circuit Court of Appeals is

in conflict with decisions of the Michigan Supreme Court which hold that Michigan by enacting this statute has adopted the common law action of escape, violation of which necessarily involved breach of official duty and constitutes nonfeasance in office.

The argument under this heading has been covered in the foregoing argument.

5. Although respondent, by executing as surety, the official bond of the sheriff undertook thereby to indemnify any person unlawfully injured by its principal's nonfeasance in office, nevertheless the effect of the decision of the Circuit Court of Appeals is to relieve such surety from liability for a judgment against its prinicpal although that judgment is predicated upon the nonfeasance of the sheriff in the performance of his official duties.

Briefly consider the logic of the holding of the Circuit Court of Appeals and its practical effect. Both court and counsel recognize that the sheriff is liable for the escape. Such liability is not predicated upon any personal act or obligation of the sheriff as an individual, but arises out of the performance of his official duties. To admit on the one hand that the sheriff is liable for such escape by virtue of the statute adopting such common law action, but to deny on the other hand that the necessary incidents of such liability resulting in a breach of his official bond and imposing liability upon the sureties thereon, is both inconsistent and illogical. The necessary result of such a holding unreversed, is that the sheriff is liable, but that while such liability arises out of his official duties and his failure to perform the same, nevertheless the surety upon his official bond is absolved from all liability.

We respectfully direct the court's attention to the fact that an important question of Michigan law is involved. That the decision of the Circuit Court of Appeals is contrary to the theory of the Michigan law as to the liability of the sheriff and the sureties upon his official bond as well as authorities from all other jurisdictions upon that question.

SUMMARY

Inasmuch as the federal court is bound to follow the state statutes and the interpretation placed thereon by the Supreme Court of the State of Michigan, and inasmuch as the sheriff is liable for the escape by virtue of the Michigan statute, and inasmuch as the Michigan court has held that by the enactment of such statute, Michigan has adopted the common law action of escape, and inasmuch as the common law action of escape is predicated either upon the willful or negligent failure of the sheriff to perform and execute the duties of his office, it follows therefore that the sheriff must be held to have been guilty of nonfeasance resulting in a breach of his official bond under the admitted rule and imposing liability upon the surety thereon.

Respectfully submitted,

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Office - Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 690

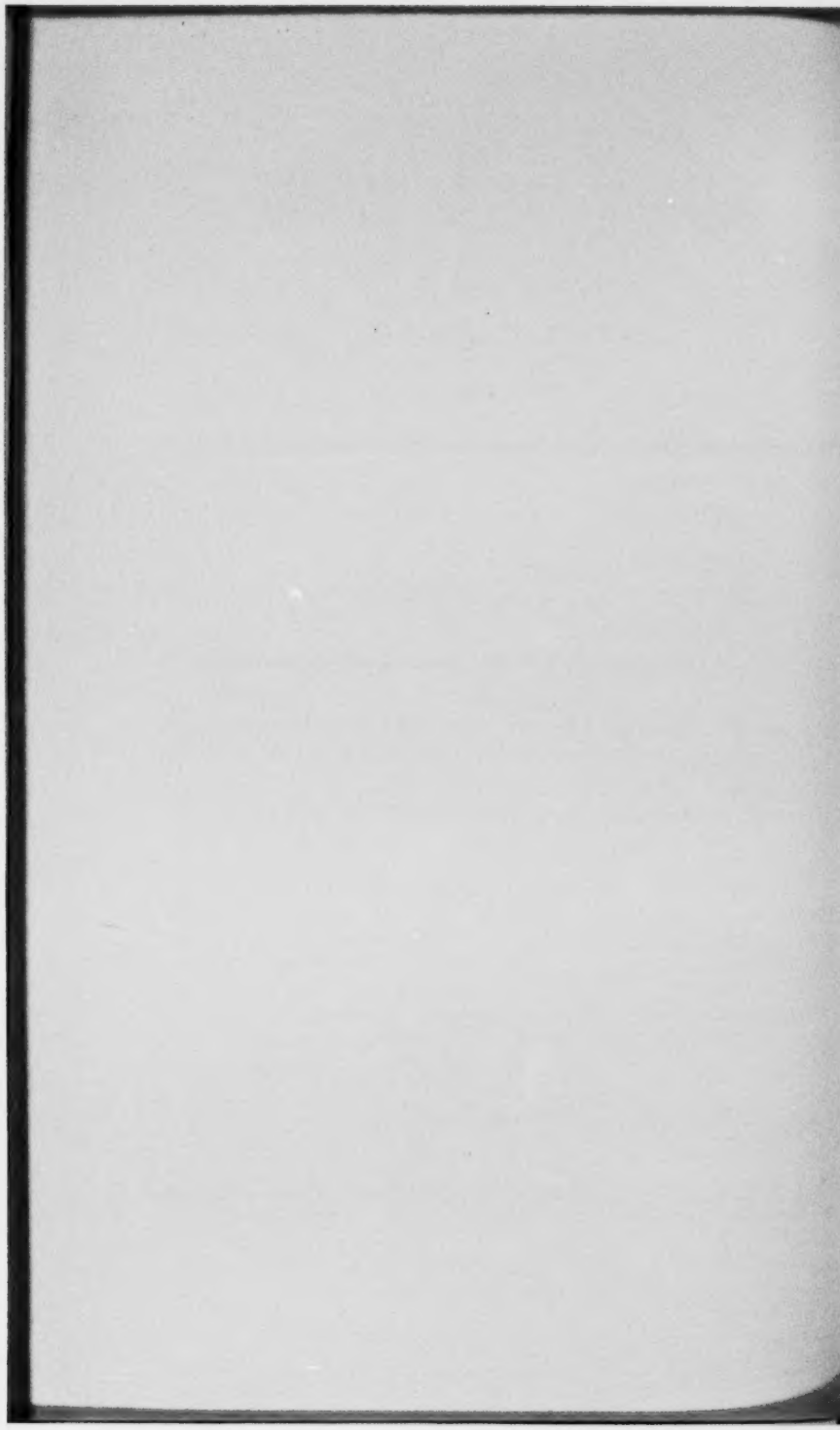
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BRIEF OF RESPONDENT, AMERICAN SURETY COMPANY OF NEW YORK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 690

JAMES VAN GILDER,
Petitioner,
vs.
AMERICAN SURETY COMPANY,
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Respondent.

BRIEF OF RESPONDENT, AMERICAN SURETY COMPANY OF NEW YORK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

The questions now sought to be reviewed are purely questions of law which were decided adversely to the petitioner by the United States Circuit Court of Appeals for the Sixth Circuit.

The petitioner's sole ground for granting the writ is that the decision of the Circuit Court of Appeals has decided a question of law in a way in conflict with decisions of the Michigan Supreme Court. He states this single ground in several different ways. He could not and does not allege that the decision is in conflict with that of any other circuit; that it is an *important* question of local law decided in a way probably in conflict with applicable local decisions; that it decided an important question of general law in a way probably untenable or

in conflict with the weight of authority; nor that it decided a question of great public importance which should be decided by the Supreme Court.

We deem it necessary to supplement somewhat petitioner's statement of facts, as follows:

ADDITIONAL FACTS

The bond sued upon was the statutory qualifying bond required of all sheriffs in the State of Michigan when they qualify for office under Section 1323, *Compiled Laws of Michigan,* 1929, as amended. The American Surety Company of New York, a New York corporation, respondent herein, executed the bond as surety in the form required by Section 1324, *Compiled Laws of Michigan,* 1929, which reads as follows:

> "Sec. 69. The condition of such bond shall be in substance as follows: 'Whereas, the above bounden ..... hath been elected to the office of sheriff of the county of ..... at the general election held therein (or at a special election held therein), on the ..... day of .....: Now, therefore, the condition of the above obligation is such, that if the said ..... shall well and faithfully in all things perform and execute the office of sheriff of said county of ..... during his continuance in office by virtue of the said election, without fraud, deceit, or oppression, and shall pay over all moneys that may come into his hands as such sheriff, then the above obligation to be void, otherwise to be and remain in full force.' "

After Howard Sturgis was taken into custody by Sheriff John S. Barnes of Clinton County, Michigan, as stated by the petitioner, a jail limits bond was executed in favor of the Sheriff pursuant to Sections 14,729-14,732, inclusive, *Compiled Laws of Michigan,* 1929, as amended, which read as follows:

> "Sec. 22. Every person who shall be in the custody of the sheriff of any county by virtue:

1. Of any capias ad respondendum; or
2. Of any execution in a civil action; or
3. Of any attachment for the non-payment of costs; or
4. In consequence of a surrender in exoneration of his bail;

shall be entitled to the liberty of the jail limits, which limits shall be co-extensive with the limits of such county, upon executing a bond to such sheriff and his assigns, as prescribed in the next section."

"Sec. 23. Such bond shall be executed by the prisoner and one (1) or more sufficient sureties, being inhabitants and householders of the county, in a penalty, which shall be as follows:

1. It shall be not less than double the amount of the sum in which the sheriff was required to hold the defendant to bail, if he be in custody on original process, or be surrendered in exoneration of his bail before judgment docketed against him;

2. It shall be not less than double the amount directed to be levied by the attachment or execution, if he be in custody upon attachment or execution;

3. It shall be not less than double the amount for which judgment shall have been rendered against him, if he be surrendered after judgment docketed."

"Sec. 24. Such bond shall be conditioned, that the person so in custody of such sheriff, shall not at any time or in any manner, escape or go without the jail limits of the county, until legally discharged."

"Sec. 25. Every such bond taken for the liberties of any jail, shall be valid, and shall be held for the indemnity of the sheriff taking the same, and of the party at whose suit the prisoner executing such bond shall be confined" (36).

Pursuant to the mandate of the statute, Sheriff Barnes

released Howard S. Sturgis on July 7, 1934 to the jail limits, which were co-extensive with the limits of Clinton County, and in the custody of the sureties on the jail limits bond. The sureties had duly verified as to their financial responsibility pursuant to the provisions of Section 14,729, et seq., *Compiled Laws of Michigan*, 1929 (36).

While the bond was in full force and effect, Howard S. Sturgis was found outside of the limits of Clinton County on December 16, 1937, and as stated by petitioner, while he was without the jail limits, suit was instituted against Sheriff John S. Barnes, and service was obtained upon him pursuant to Sections 14,736-14,738, inclusive, *Compiled Laws of Michigan*, 1929, which read as follows:

> "Sec. 29. The going at large of any prisoner who shall have executed such bond, or of any prisoner who would be entitled to the liberties of any jail upon executing such bond, within the jail limits of the county in which he shall be in custody, shall not be deemed an escape of such prisoner; but in case any such prisoner shall go at large without the jail limits of such county without the assent of the party at whose suit such prisoner shall be in custody, the same shall be deemed an escape and forfeiture of the bond so executed, and the sheriff in whose custody such prisoner shall have been, shall have the same authority to pursue and retake such prisoner, as if such escape had been made from the jail."
>
> "Sec. 30. In every suit brought by a sheriff on such bond, the defendants may give notice of a voluntary return of the prisoner to the liberties of the jail from which he escaped, or a recaption of such prisoner by the sheriff from whose custody he escaped, before the commencement of such suit, and may give evidence thereof in bar of such action; and such defendants shall be entitled to make such or any other defense to such suit, which might be made by such sheriff, to an action against him for an escape."
>
> "Sec. 31. But if an action shall have been brought against such sheriff for such escape, and due notice

thereof shall have been given to the prisoner and his sureties who executed the bond for the jail liberties, the judgment against such sheriff shall be conclusive evidence of his right to recover against such prisoner and his sureties, to whom such notice was given, in the action on such bond, as to all matters which were or might have been controverted in the action against the sheriff."

Such suit, following an appeal thereof to the Supreme Court of the State of Michigan, resulted in a judgment in favor of the petitioner and against Sheriff John S. Barnes in the sum of $5,167.50. The case was reported in the reports of the Supreme Court of the State of Michigan in 288 Mich. 492, 285 N. W. 35, to which reference is made (32).

The petitioner herein did not elect to take an assignment of the jail limits bond, pursuant to Section 14,744, Compiled Laws of Michigan, 1929, which reads as follows:

"Sec. 37. If any such bond shall be forfeited, the party at whose suit the prisoner executing the same shall have been confined, or in case of his death, the executors or administrators of such party, shall be entitled to an assignment thereof, which shall be made by the sheriff taking the same, or his successor in office, or in case of a vacancy in his office, by his under-sheriff, by an indorsement thereon."

Subsequently the present action was instituted against the American Surety Company of New York, respondent herein, as stated by the petitioner. The Federal District Judge found in favor of the petitioner and against the respondent, but predicated his decision upon the erroneous belief that the judgment against Sheriff John S. Barnes was conclusive against the surety upon his official bond. That premise the District Judge stated as follows:

"The judgment of the Circuit Court for the County of Clinton has become final and is binding upon this Court. This judgment establishes that said John S. Barnes failed to faithfully perform and

execute the office of said sheriff of said county, and this decision is binding upon this Court" (62-63).

This judgment was reversed by the Circuit Court of Appeals as stated by petitioner.

QUESTION IN ISSUE

The issue before the Federal District Court and the United States Circuit Court of Appeals may be stated as follows:

Does a breach of the official bond of a sheriff result from the escape of a judgment debtor, arrested by such sheriff under capias ad satisfaciendum, but at liberty under a jail limits bond given pursuant to statute, and is the surety upon the sheriff's official statutory bond liable for the judgment recovered against the sheriff based upon such escape and pursuant to the provisions of the statute?

ARGUMENT

We do not believe that this is a cause under the rules of this Court and Section 240 (a) of the Judicial Code as amended (28 U. S. C. A. Sec. 347) in which a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit should issue. We realize that whether or not a writ of certiorari to the Circuit Court of Appeals should issue rests in the sound discretion of this Court, but on the other hand, while the power is coextensive with all possible necessities, it is a power which will be sparingly exercised, and only when the circumstances of the case as applied to the situation at bar, make it clear that there is a conflict between the decision of the United States Circuit Court of Appeals on a question of Michigan law and the decision of the Supreme Court of the State of Michigan upon that same question.

Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 195.

We think we can demonstrate by briefly citing and

quoting from Michigan decisions that the United States Circuit Court of Appeals for the Sixth Circuit in deciding this case was entirely in harmony with the decisions of the Supreme Court of the State of Michigan, insofar as they have passed upon the questions that may be considered to be involved in this case.

In the opinion of the Circuit Court of Appeals it was stated that the problem was one of first impression (72). The petitioner in his brief on page 6 states in effect that there is no case of the Supreme Court of the State of Michigan or any court authority directly in point, and it is, therefore, strictly speaking a case of first impression. There is, therefore, some inconsistency in petitioner's claim that the decision of the Circuit Court of Appeals is in conflict with the decisions of the Michigan Supreme Court. Be that as it may, the decisions of the Supreme Court of the State of Michigan speak for themselves.

Under the law of Michigan, as established by its Supreme Court, proceedings may be had against the sheriff and the surety on his official bond, either jointly or severally.

Doran v. Butler, 74 Mich. 643, 647, 42 N. W. 273.

When an action is brought against a sheriff upon his official bond and judgment secured, and later an action is brought upon his official bond upon the same cause of action, the question is then immediately presented as to the effect to be given to the judgment against the sheriff in establishing the liability against the surety. As eary as the case of *Norris v. Mersereau,* 74 Mich. 687, 42 N. W. 153, it was held that at the most such judgment should be given only prima facie credit. This same rule was enunciated in the cases of *McPharlain v. Fidelity & Deposit Co.,* 162 Mich. 141, 127 N. W. 307, and *Sauer v. Detroit Fidelity & Surety Co.,* 237 Mich. 697, 213 N. W. 98, 51 A. L. R. 1485, which demonstrates the error of the district judge.

The bond in suit is purely a statutory bond executed pursuant to Section 1,323, *Compiled Laws of Michigan,* 1929, as amended, the form being prescribed by statute in Sec-

tion 1,324, *Compiled Laws of Michigan,* 1929 (supra). The liability under the bond would, therefore, be measured by the statute. Under the statute and interpretations of it by the Supreme Court of the State of Michigan, there is a twofold obligation in the bond of the sheriff, (1) that he will faithfully perform the duties of his office, and (2) that he will pay over all moneys that will come into his hands as said sheriff. To render the surety upon the bond liable there must be a finding that the sheriff violated one of these conditions.

County of Lenawee v. Nutten, 234 Mich. 391, 208 N. W. 613.

The rule has been established by the Supreme Court of the State of Michigan that the surety upon the sheriff's official bond is liable to all persons unlawfully injured by nonfeasance, misfeasance or malfeasance perpetrated by the sheriff, either by virtue of office or under color of office.

Kosowsky v. Fidelity & Deposit Co., 245 Mich. 266; 222 N. W. 153;
Rostatter v. Hinchman, 243 Mich. 589, 220 N. W. 775;
Norris v. Mersereau, 74 Mich. 687, 42 N. W. 153.

It does not follow that evidence of liability on the part of the sheriff necessarily involves the surety on his official bond. An official may be liable personally, although not liable on his bond. The liability of the surety is limited by the terms of the bond and the statute pursuant to which it is given.

Davis v. Moore, 215 N. Car. 449.

There is nothing either in the statute or in the bond as written upon which it could be inferred that the surety upon the sheriff's official bond contracted with a view to becoming bound by a judgment against the sheriff. To hold the surety upon the sheriff's official bond liable, it must be affirmatively shown that there has been such a breach of a condition of the bond as to render the surety

liable for damages which it had in effect contracted to pay.

Berry v. Schaad, 59 N. Y. S. 551, 28 Misc. Rep. 389; Affirmed 63 N. Y. S. 349, 50 App. Div. 132.

The statute under which the petitioner endeavors to assert his action against the respondent is highly penal and requires strict construction.

Brady v. Hughes, 181 N. Car. 234, 106 S. E. 829.

The sheriff could only be sued when a judgment debtor prisoner escaped from the jail limits while out of his custody on a jail limits bond given to release him, because the statute provided the judgment creditor with such a remedy. And this remedy was given to the judgment creditor even though the sheriff was free from any fault in relation to the escape of the prisoner. The Supreme Court of Michigan has consistently made a distinction between an escape from the custody of the sheriff and an escape from the custody of the sureties upon a jail limits bond.

In the case of *Smith Sturgeon & Co. v. Grosslight,* 123 Mich. 86, 81 N. W. 975, it was necessary to construe the statute on a jail limits bond, and it is very instructive as to the situation before us. In the course of its opinion the Court said:

> "Grosslight was upon the jail limits of the county under a bond which provided, in substance, that he should not at any time or in any manner escape or go without the jail limits of the county of Wayne until legally discharged. *His sureties undertook, by executing the bond, to keep him within the jail limits. He was as much within the custody of the sureties on the bond as he would have been in the custody of the sheriff had he remained in jail. The jail-limits bond, in effect, is a substitute for the custody of the sheriff.*" (Italics ours).

Later on in the opinion the Court quoted from *Meredith's Admr. v. Duval,* 1 Munf. 83:

> "The bond taken by the sheriff for keeping the rules is as much a muniment of safety in behalf of the creditor as the keys of the jail are in relation to a prisoner in close custody."

The entire tenor of the opinion in the Grosslight case, though distinguishable upon the facts from the case at bar, seems to draw a clear distinction between the custody of the sheriff and the custody of the surety on the jail limits bond. The Court also said in its opinion that:

> "The rule seems, therefore, well settled, that nothing but the act of God or the enemies of the country will excuse the sheriff for an escape; and the same rule is applicable as against the sureties on the bond to the jail limits. This is also the rule of the federal courts."

Therein the Michigan Supreme Court pointed out that its application of the law was in conformity with the application of the law by the Federal Courts. The rule as to escape is very stringent, but in the Grosslight case the Court was talking about an escape from the jail limits in relation to the liability of the sureties upon the jail limits bond. It may be said that the rule is not that when the prisoner is out of close custody by virtue of a jail limits bond, that nothing but the act of God or the enemy of the country will excuse the sheriff for the escape, but rather that if there is an escape, while the prisoner is in the close custody of the sheriff, nothing but the act of God or the enemies of the country will excuse it. On the other hand, if he is out of the close custody of the sheriff by virtue of a jail limits bond, nothing but the act of God or the enemies of the country will excuse the sureties on the bond to the jail limits for the escape.

In other words, the stringent rule does not apply to the sheriff as such when the prisoner is out of his custody on a jail limits bond, but the rule is then applied against the sureties upon that bond.

In the case of *Kruse v. Kingsbury,* 102 Mich. 100, 60 N. W. 443, there is a careful review of authorities from

various jurisdictions in interpreting the statute in question and jail limits bonds given pursuant thereto. On page 105 of the report, quoting from *Cargill v. Taylor,* 10 Mass. 208, it was said:

> " 'Bonds given to entitle a prisoner to the liberties of the prison-yard are, in effect, a substitute for the custody of the sheriff. After the enlargement of the prisoner, upon the acceptance or allowance of the bond, his restraint, the custody in which he remains, is altogether of a moral nature — sense of his liability and of the responsibility of his sureties in the penalty of the bond. The consent of the creditor is not implied in the transaction. * * * *A bond regularly taken and allowed discharges the sheriff from any further responsibility for the prisoner's remaining within his custody.* The restraint to which he is subject is indeed called the custody of the jailer; not, however, as expressing his power of control or a confinement within the walls of the prison, but the bounds and limits prescribed by law, in which he is kept by the penalty of the bond.' " (Italics ours).

Later in the opinion the Court quoted from *Meredith's Admr. v. Duval,* 1 Munf. 83, as follows:

> " 'A prisoner who gives security for the prison bounds is from thenceforward no otherwise in the custody of the sheriff than as may be sufficient to protect the sheriff against any suit which the creditor may bring against him for not confining the debtor within the walls of the prison. * * * He is in the custody of the law, but the sheriff has no longer any power over him, either to restrain him or to discharge him.' "

and likewise quoting from *Lyle v. Stephenson,* 6 Call, 54, the Court said:

> " 'After the sheriff has taken a prison-bounds bond from the debtor, * * * the debtor is then in the custody of the law, and the sheriff has no power to authorize or prevent his escape.' "

The petitioner relies upon Section 14,752, *Compiled Laws of Michigan*, 1929, for statutory authority for holding the respondent herein liable. That portion of the statute is found under the subdivision of the Judicature Act entitled, "Of Escapes and Liability of Sheriffs Therefor," and reads as follows:

> "Sec. 45. If any prisoner committed to any jail, in execution in a civil action, or upon an attachment for the non-payment of costs, shall go or be at large without the jail limits of the county in which he shall have been imprisoned, without the assent of the party at whose suit such prisoners shall have been committed, the same shall be deemed an escape of such prisoner, and the sheriff having charge of such jail shall be answerable therefor to such party for the debt, recovered in an action of assumpsit or of trespass on the case."

In this section of the statute there is no provision made for the situation where the prisoner shall escape from the jail limits when he is out of the close custody of the sheriff by virtue of a jail limits bond. Because of the penal nature of the statute and the strict construction which follows therefrom, there can not be read into the statute a like liability upon the part of the sheriff when the prisoner is at liberty on a jail limits bond. Furthermore, the statute is entirely silent as to any liability upon the part of the surety upon the sheriff's official statutory bond. No more can a provision be read into the statute that the surety upon the sheriff's official statutory bond will be liable.

The petitioner attempts to reason from analogy that, since the sureties on the sheriff's official bond are liable for the escape of a prisoner arrested under a capias ad respondendum, it must follow that the sureties upon the sheriff's official bond are liable in the situation before us; but in doing so he does not take into consideration the difference in the statute, and we think that that difference is very significant as applied to the present situation. The statute there controlling is a part of the Judicature Act pertaining to Arrest and Bail in Civil Ac-

tions. The petitioner quotes a portion of the statute. The entire section of the statute reads as follows:

> "Sec. 13. If, in any such action, after a reasonable time, the sheriff or other officer shall not satisfy the plaintiff in the action the amount due him, with costs and interest, the court shall award execution on the judgment against such sheriff or other officer; and if such execution be returned unsatisfied, in part or in whole, *the same proceedings shall be had on the official bond of such sheriff* or other officers to collect such deficiency, as in other cases of delinquency." (Italics ours).

There it is to be seen that the statute specifically provides that the surety upon the official bond of the sheriff shall be liable. Also there was involved an entirely different kind of an escape than we have in the case at bar. The kind of escape involved in that section of the statute would necessarily be the result of either malfeasance, misfeasance or nonfeasance in office by the sheriff.

The petitioner relies upon the Michigan case of *Wilson & Co. v. Franz,* 206 Mich. 581, 173 N. W. 541. That case did not involve the liability of a surety either upon the sheriff's official bond or upon the jail limits bond. It simply held that by virtue of the statute the judgment creditor had a right to sue the sheriff by virtue of the statute if the judgment creditor was found without the jail limits while out of his custody on a jail limits bond, and pointed out that the judgment creditor had the right to elect either to sue the sheriff or to accept an assignment of the jail limits bond and sue the sureties thereon.

The case of *South v. State of Maryland,* 18 Howard 396, 15 L. Ed. 433, cited by petitioner on page 11 of his brief, fully supports the argument of respondent.

In view of the authorities we have quoted and cited, it seems to be clear that insofar as the Michigan Supreme Court has spoken upon the subject the surety upon a sheriff's statutory official bond is only liable upon affirmative proof of an act of nonfeasance, misfeasance or malfeasance. There is no allegation in the pleadings,

nor any proof in the record in this case, of any such acts. There was nothing that the sheriff could have done to have prevented the escape in question. The prisoner was out of his custody, was beyond his control, and the sheriff is only liable because the statute makes him subject to suit and judgment as a means of assisting the creditor to collect his judgment. There is nothing in the contract as expressed in the statutory official bond to indicate that the surety contracted for the liability sought to be imposed upon it by the petitioner.

Under mandate of the statute the sheriff was obliged to permit the prisoner the liberty of the jail limits upon the furnishing of a proper jail limits bond. The bond furnished indemnified the sheriff against loss by reason of his statutory liability for an escape, but the surety on the sheriff's official bond did not contract to indemnify any one for an escape, except as such escape might be due to some breach of the obligation of the sheriff to well and faithfully perform and execute the duties of his office. It was certainly beyond the contemplation of the surety in the case at bar on the sheriff's official bond that it would be liable for an escape when the sheriff was required to permit the prisoner to be at liberty upon a jail limits bond.

CONCLUSION

The Circuit Court of Appeals for the Sixth Circuit by its decision in the case at bar did not establish a principle of law in conflict with either the statutory law of Michigan or the law of Michigan as established by its Supreme Court. Its decision was entirely in harmony with the decisions of the Supreme Court of the State of Michigan in relation to the statute involved. It, therefore, follows that the ground upon which the petitioner rests his case for the granting of a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is without foundation.

We, therefore, pray that the petition be denied.

Respectfully submitted,

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